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MEDIA AND DEFAMATION LAW

(LAW 369H1S)

Bert Bruser and Paul Schabas

CASES AND MATERIALS

(2010 – 2011)

VOLUME II

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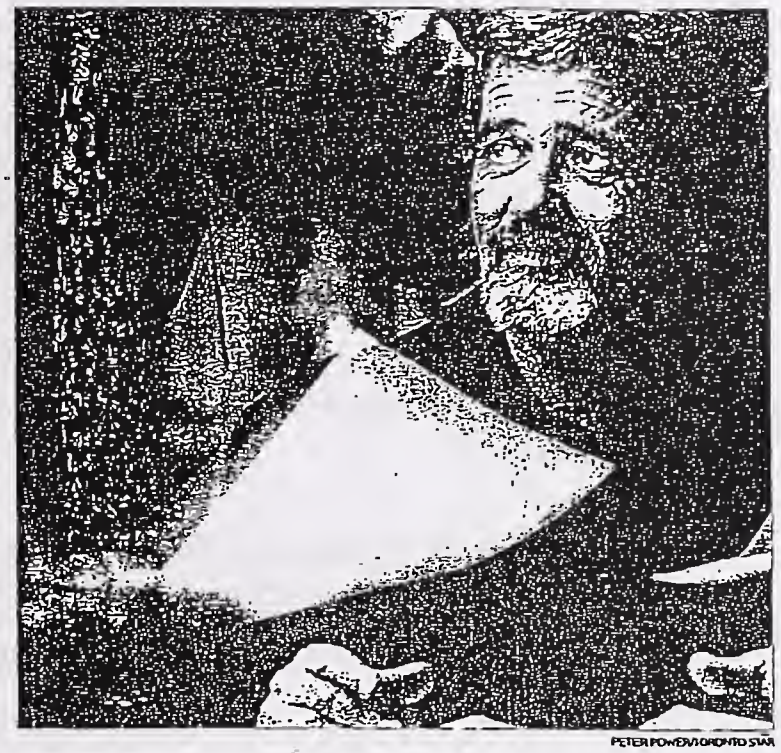
'Often my views are unpopular'

The lawyer advises editors about legal risks – sometimes at deadline while walking the dog



PETER POWER/TORONTO STAR

BERT BRUSER: Star lawyer says the Paul Bernardo murder trial changed the way newspapers cover trials in Ontario.

BY BERT BRUSER
SPECIAL TO THE STAR

I am not well liked. In the newsroom, they call me names, often to my face. Rosie DiManno — the fierce soul of The Star — got so angry with me in 1994 that she refused to speak to me for a whole year.

I'm The Star's lawyer. It's my job to advise the newspaper on the legal risks of publishing stories and columns. This produces tension. Often my views are unpopular.

Although Canadians believe that we have a free press, a notion enshrined in the Charter of Rights and Freedoms, there are in fact restrictions on what can legally be published. This is particularly true in crime reporting.

For example, it is illegal to publish anything that would identify a young offender, or a victim of a sex assault. Publication bans are usually imposed on bail hearings and preliminary hearings. Recently, an ill-advised justice of the peace imposed a publication ban on the name of a police officer accused of murder. The most difficult and vague legal concept is that after a person has been arrested, the media should not publish anything that would prejudice the trial.

What this myriad of laws means is that I read many of the stories published in The Star before you do. This often occurs at night, on deadline. I swear a lot, particularly at assignment editors who phone me while I am walking my dog or trying to eat dinner with my wife.

The Star didn't always consult lawyers before running crime stories. On Oct. 17, 1951, the day after the arrest of Edwin Alonzo Boyd, the leader of the notorious gang of bank robbers, The Toronto Daily Star published a story that Boyd had confessed to the crimes. And this:

"Boyd asked police to apologize for him to a girl employee of the Sheppard Avenue bank for tearing her blouse. 'I am sorry I did it.'"

The story clearly amounts to contempt of court. It convicts Boyd of his crimes. In those days, however, the newspapers were not prosecuted, and the coverage was similar to that in the United States — everything the reporters could dig up was published. Lawyers were rarely consulted.

A few years later, however, The Toronto Daily Star apparently went too far in its coverage of a trial.

The editor at the time, Beland Honderich, was summoned to a private meeting in the chambers of the stern chief justice, James McRuer. Honderich was ordered in no uncertain terms to comply with the law of the land — which was that a newspaper could not publish anything that would prejudice a trial. From that day forward, The Star's lawyers were instructed to remove objectionable facts from crime stories.

My predecessors at Blake, Cassels & Graydon, The Star's lawyers since the late 1950s — including such luminaries as Alex McIntosh, Jake Howard, and Ted Donegan — would severely censor Star stories. Deleted to comply with the law were such things as:

- The previous criminal records of people charged with a crime.
- The fact that an accused has confessed.
- The motive for the crime — for example, that the accused had been jilted by the murdered woman.
- That neighbours said the accused had a violent temper, and so on.

The judges of the day believed that nothing should be allowed to interfere with a fair trial. A reader of the paper might be called as a juror at the trial of the accused. Prior convictions might not be admissible as evidence at the trial. A juror who had read of the prior conviction in The Star might be prejudiced against the accused, and decide the case not on the basis of the evidence presented at the trial, but because of the previous conviction. Cases should be decided on the basis of facts before the court, not what jurors read in the paper.

This meant as well that once a trial started, columnizing ended. Our jurors are not sequestered during trial, as they sometimes are in the United States, and the fear was that a juror who went home at night could read and be affected by the opinions on a case expressed by the leading columnists of the day. All that was published during trials would be a fair and accurate account of what happened in court that day. No interviews with talking heads opining on strategy, or with the family of the victim. No columns.

All of this changed — dramatically — in 1994 when Paul Bernardo came to trial for the murders of Kristen French, 15, and Leslie Mahaffy, 14. In the most heavily covered trial in this country's history, many of the previous rules were abandoned. Rosie DiManno at The Star, and her pal Christie Blatchford, then at the Toronto Sun, went wild, writing columns every day.

Neither was prosecuted. How could this happen? Wasn't it against the law? One factor may have been this: Paul Bernardo raped and tortured the two victims — and it was on videotape. The jury saw this. The only issue at trial was: did he also kill them? So writing negative opinions about Bernardo, as DiManno and Blatchford did, was not going to prejudice the jury.

At The Star, we worried about columns attacking the credibility of witnesses — particularly Karla Homolka, or Karly Curls, as DiManno called her.

Every night during the trial, the editors and I read her columns religiously. On one such night, we felt she went too far, and it fell to me to tell her on the telephone that three paragraphs had to be deleted. DiManno, who defines her job in terms of the freedom it gives her to express her opinions, disagreed.

"You're not a lawyer," she snarled. "You're just a copy editor." (DiManno doesn't get along with copy editors, either.) Her point was that there was no legal reason for cutting the paragraphs. In hindsight, I confess that she was right, but at the time, I would have none of it.

"F— off, Rosie," I shouted, and slammed the phone down. All in the newsroom had heard my expletive. Rosie refused to speak to me (it wasn't the swearing; you just don't hang up on Rosie DiManno), and in a memo she wrote suggesting ways in which the paper could be improved, her 13th point was: "Nothing personal, but get the lawyer out of the newsroom."

(Rosie and I have since made up; on those rare occasions when she's in town, she always asks me to go for a smoke.)

In any event, neither DiManno nor Blatchford was cited for contempt, and the media (and their lawyers) have become emboldened.

Also in 1994, the Supreme Court of Canada concluded that under the Charter of Rights, freedom of speech and the public's right to know are as important as the right to a fair trial. So the competing values have to be balanced in each case. What would have amounted to contempt of court in the old days — for example, publication of an accused's criminal record — can be published (we at The Star hope) at the time of arrest if there is a clear public interest in doing so.

So now, if a man is charged with murdering his wife, and has prior convictions for beating her up and was ordered by a court to stay away from her, The Star believes the public should know that the judicial system has broken down, that not enough has been done to protect abused women. So these details are published at the time of arrest, even though potential jurors might read them.

So far, this approach seems to be working. DiManno and others are writing columns during trials; criminal records of the accused are published when it's in the public interest; and there have been no citations for contempt of court.

Now when I get a call at 10 p.m. about such a matter I tell the poor assignment editor that it's a policy issue, not a legal matter.

The editors decide whether a story is in the public interest, not the lawyer. "Call the managing editor," I chuckle. "She's probably just sitting down to dinner."

Bert Bruser is The Star's lawyer.